Supreme Court, U.S.
FILED
JAN 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-987

In The

Supreme Court of the United States

October Term, 1988

DAVID HESSE,

Petitioner,

v.

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 211, COOK COUNTY, ILLINOIS, ROBERT CREEK, ANNA COUNTRYMAN, ANNE KOLLER, JOSEPH MARCHIORI, JAMES ROGERS, ROBERT SEGER, RICHARD C. KOLZE and JACK GAZA,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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January 6, 1989

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37 pp

QUESTIONS RESTATED

1. Should the Petition be granted to review the Court of Appeals' holding that a teacher's disruptive protests against criticisms and negative evaluations of his professional performance, directed exclusively to his employers, constituted employment speech on personal disciplinary issues, not matters of public concern?

2. Should the Petition be granted to review the Court of Appeal's alternative determination that a teacher's eight-year campaign of hostile, abusive protests to his superiors against his performance evaluations was disruptive?

3. Should the Petition be granted to review the Court of Appeal's analysis of the case under the multi-faceted tests articulated by this Court in *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), instead of an "objective" test based on the gross subject matter of the speech?

4. Where the case was submitted to the jury on an erroneous instruction indicating that the First Amendment protected all the petitioner's speech, should the Petition be granted to review the degree of deference due the factual findings of the trial court?

STATEMENT REQUIRED BY RULE 28.1

Respondent Board of Education of Township High School District No. 211, Cook County, Illinois, is a municipal corporation, with no parent company, subsidiary, or affiliate.

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BRIEF IN OPPOSITION

This case presents the unique fact pattern of an eight-year controversy between a teacher and his employers, consisting of heated, often angry and insulting reactions against critiques of his professional performance. Despite dozens of communications between the teacher, petitioner David Hesse, and the respondent school officials, the conflict intensified.

As matters escalated, Hesse joined polemics on educational issues to the defense of his teaching practices. All such communications were directed to his superiors, in the context of responses to professional criticism.

After years of this hostile dialogue, respondents directed Hesse to cooperate with the evaluation process, improve his teaching, and cease his insubordinate commentary. Hesse charges that this directive as well as various negative evaluations, and a routine transfer to an equivalent position with no loss in pay, were made in retaliation against his exercise of First Amendment freedoms.

Proceeding by differing analyses, all three members of the Seventh Circuit panel held that the First Amendment does not protect the speech that Hesse now puts in issue. There is no reason to review their painstaking analysis, or their unanimous result.

COUNTERSTATEMENT OF THE CASE

Despite Hesse's[1] argument for an "objective," content-based analysis of First Amendment issues, his Statement of the Case omits his actual speech.

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[1] As used in this Brief in Opposition, "Hesse" refers to petitioner David Hesse. "School Board" or "School District" refers to respondent Board of Education of Township High School District No. 211, and sometimes collectively refers to the Board and individual board member respondents Robert Creek, Anna Countryman, Anne Koller, Joseph Marchiori, James Rogers, and Robert Seger. "Gaza" refers to respondent Jack Gaza, principal of Schaumburg High School, where Hesse was employed during the 1983 - 1985 period. "Institute" refers

(Continued on following page)

Hesse bases his claim on speech concerning his conduct on two occasions during the 1983-84 school year: (1) a classroom display of anger; and (2) a protest at a mandatory teacher's institute. (Pet., pp. 3-4.) The speech at issue thus includes Hesse's speech at the teacher's institute (discussed below, pp. 5-8), two internal memoranda about that occasion (Pl.Ex. 15, and Def.Ex. 4), and several meetings between Hesse and his immediate supervisors.[2] (Discussed below, pp. 4-5, 8-10.)

Hesse characterizes the contents of his speech as "discipline, grading, and evaluation issues", and presents these exchanges as isolated occurrences. (Pet., p. 3.) His speech, however, must properly be viewed – as did the jury, trial court, and appellate court – within their immediate context of Hesse's personal reaction to professional criticism, as well as the broader perspective of eight years of protest.

(Continued from previous page)

to the teachers' institute held March 2, 1984, pursuant to Sections 3-11 and 24-3 of the School Code, Ill.Rev. Stat. ch. 122, ¶¶3-11 and 24-3 (1987). The record is cited as "R.", and the transcript as "Tr.". Hesse's Petition for Writ of Certiorari is referred to as "Petition" and is cited as "Pet." or, where appropriate, by parenthetical page citations. The opinion is published as *Hesse v. Board of Education of Township High School District No. 211, Cook County, Illinois*, 848 F.2d 748 (7th Cir. 1988).

[2] The Seventh Circuit also reviewed several later communications that Hesse made during the 1984-85 school year. 848 F.2d at 752 *et seq*, and at 756 *et seq*. On petition for rehearing, Hesse advised the appellate court that his claim was based on his statements during the 1983-84 school year, particularly his speech at the Institute and ensuing discussions. (Pet. for Rhrg., pp. 3-4.) Hesse pursues the same theory in this Court. (Pet., pp. 3-5.)

The following Counterstatement of the Case supplies the actual content of Hesse's speech, as well as the context and the form in which it was made.

A. The Conference About Hesse's Display Of Anger In The Classroom.

The first speech in issue occurred during a meeting between Hesse and his principal, Jack Gaza, concerning an angry outburst when Hesse's students failed to complete a research assignment. Tr., p. 43 (Hesse). Hesse brandished a roll of masking tape and "read them the riot act", announcing: "This kind of course doesn't need a bunch of lazy asses . . . ". Tr., p. 118 (Hesse); pp. 493-94 (Gaza); pp. 483-84 (Weimer); Def.Ex. 16. Hesse then kicked a chair and threw down the tape, which crashed against a metal cabinet. Tr., p. 43 (Hesse), pp. 493-94 (Gaza), pp. 483-84 (Weimer), Def.Ex. 16. Hesse walked out of the classroom, leaving the students by themselves for the rest of the period. Tr., p. 42 (Hesse), pp. 493-94 (Gaza). Gaza received written complaints from students about the incident. *Id.* Two complained that Hesse had "gone berserk in the Crafts class." Tr., p. 43 (Hesse).

At the meeting, Hesse explained that he "presented this 'anger' act" to establish discipline, because the students would be using dangerous equipment in class. Tr., p. 43 (Hesse). Suggesting that Hesse could motivate students in a more positive way, Gaza cautioned Hesse that his behavior had been unacceptable, and instructed Hesse not to repeat it. Tr., pp. 260-61 (Gaza). Hesse told Gaza "I felt it was a teaching technique that I would use again." Tr., pp. 43-45 (Hesse); pp. 494-95 (Gaza); Def.Ex. 16.

Gaza recorded this meeting in a file memorandum (Pl.Ex. 47), additionally noting:

> The conversation degressed [sic] to his [Hesse's] unhappiness with the public education system and specifically some of District 211's procedures.
> He felt the Art Department was a dumping ground for students who could do little else. He referred to some of his students as morons and idiots.
> My impression is that Mr. Hesse rationalizes his actions because he is frustrated and unhappy. I believe the reason he doesn't leave education is that he fancys [sic] himself somewhat of a crusader for the improvement of the system. Although he is knowledgeable in his field I feel his attitude and methods are a determent [sic] to the Art Program at Schaumburg High School.

Id. The record is otherwise silent as to what Hesse said during this digression over his unhappiness.

The Seventh Circuit found no issue of public concern in connection with this incident.

B. Hesse's Speech At The Teacher's Institute of March 2, 1984.

Hesse received a bad performance evaluation on February 28, 1984. (Pl.Exs. 11, 12 and 13.) It focused on his poor relationship with his students, and his lack of cooperation with administrative procedures, particularly with evaluations. *Id.* Several days later, the School Board held a teacher's institute with mandatory faculty attendance, as provided by Illinois law. Ill.Rev.Stat. ch. 122, ¶¶3-11, 10-19, and 24-3 (1987). Dr. Clark, a prominent educator, gave a keynote speech on global and future education; Hesse took the occasion to protest his evaluation. Tr., pp. 48-50 (Hesse); pp. 262-64, 288-89, 495 (Gaza).

During several minutes of rhetorical questions to Dr. Clark, Hesse accused the school district of using teacher

evaluations to inflate grades: "through the threat of a bad evaluation, you either have high grades and you pass the kids or you are not a good teacher." Tr., p. 50 (Hesse). "I pointed out that I, myself, had received from a previous principal, Mr. Weimer, a perfectly good evaluation at the end of the school year, and the next year rolled around, and suddenly I had bad evaluations." Tr., p. 50 (Hesse).[3]

In one of the two memoranda for which Hesse claims Constitutional protection, he characterized his speech at the Institute as follows:

> You accuse me of acting unprofessionally by using the meeting to discuss my personal evaluation. Nonsense, Jack. . . .The issue under discussion was grade fraud, or, to put it more politely, grade inflation.
>
> * * *
>
> I, naturally, leaped to the defense of our district. I suggested that we were fortunate to have you present to answer these questions. Furthermore, I pointed out that even though in the previous year, Carl Weimer and the district art chairman, Bob Wheat, had given me a perfect evaluation, and that this year you gave me a bad one, you could assure us that such a strange turn of events was not due to the existence of such a policy in our district. Needless to say I was crushed when you failed to inform Dr. Clark that the administration in our district never abused the evaluation process in such a manner. . . .

Pl.Ex. 15. Hesse made all of these statements during a few minutes of questions to the lecturer. Pl.Ex. 15 (5 minutes); Tr., p. 241 (30 seconds – 1 minute)

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[3] Other members of the audience testified that Hesse's questions dealt with his own concerns, not the speaker's topic. Tr., pp. 416, 447 (Maddox), p. 398 (Templeton). One teacher recalled Hesse asking personal questions, as though he were trying to get back at the administration. Tr., pp. 390-91, (Burtt).

(Wheat); p. 262 (5 minutes) (Gaza); p. 531 (2-3 minutes) (Purgatorio).

Hesse also resisted the seating arrangements at the Institute. Tr., p. 390 (Burtt). The guest speaker had requested closing the back of the auditorium so the faculty would sit near his visual presentation. Tr., p. 390 (Burtt). Believing the administration had cordoned off the back of the auditorium with masking tape "to create the illusion that everyone is enthusiastic to be there and wanted to sit close to the presentation", Tr., pp. 50-51 (Hesse), Hesse defiantly sat in the back, and refused Gaza's request to move closer. Tr., pp. 49-51 (Hesse). After the lecture Hesse staged a demonstration, pulling and ripping up or throwing tape, and displaying it to the assembly. Tr., pp. 50-51, 156-57 (Hesse); p. 241 (Wheat). He asked the guest speaker "whether or not he thought it was a good working relationship among teachers and administrators in school systems if teachers were hurded [sic] around like they were little children by taping off whole rows in an auditorium to create the illusion that teachers were actually approving of how they were spending that day." Tr., pp. 51-52 (Hesse).

Numerous faculty members and administrators were embarrassed or offended by Hesse's conduct at the Institute. Tr., pp. 390-91 (Burtt), 394-96 (Templeton), pp. 264, 288-89 (Gaza), Pl.Ex. 14. Members of the audience asked Hesse to sit down, be quiet, and stop interrupting the program. Tr., pp. 394-96 (Templeton); pp. 416-17 (Maddox); p. 528 (Ferguson); p. 532 (Purgatorio).

In unrebutted testimony Nurse Beverly Templeton stated that she went to see Hesse immediately after the incident, out of concern for his conduct. T., p. 396 (Templeton). Cf. pp. 516-17 (Hesse). He told her "that he was

unhappy with his evaluation, and that he felt that if administrators could evaluate the teachers, the teachers should be able to evaluate the administrators." *Id.*

The majority considers this evidence of disruption essential, noting

> the increasing hostility and deteriorating employment relationship which had been developing between the plaintiff and his superiors for almost five years preceding the alleged adverse job action. The plaintiff's conduct at the March 2, 1984 faculty symposium illustrates the depths to which the relationship had disintegrated, as well as the disruption to the work place.

848 F.2d at 753. The dissent similarly concludes that Hesse's speech at the Institute

> posed a significant threat to the harmony between Hesse and his co-workers, to Hesse's employment relationship with his colleagues and superiors, and to the principal's ability to maintain discipline in the school . . . Furthermore, some of the questions arose out of a dispute Hesse was having with his superiors regarding his own negative evaluations.

Id. at 757.

C. Hesse's Two Memoranda Concerning The Teachers' Institute.

Gaza reprimanded Hesse for unprofessional behavior at the Institute in a memorandum on March 6, 1984. Pl.Ex. 14. Hesse met that afternoon with Gaza and Assistant Principal Donald Maddox. As summarized by Gaza in a March 7, 1984 memorandum, they discussed Gaza's memorandum and Hesse's evaluation; Hesse challenged their administrative experience and their expertise to evaluate him. Pl.Ex. 16; Tr., pp. 420-22 (Maddox); Def.Ex. 9.

In this context, Hesse wrote the two memoranda for which he now claims Constitutional protection, Plaintiff's Exhibit 15 and Defendant's Exhibit 4. The first lengthily responds in the following vein to Gaza's March 6 memorandum:

> Jack [Gaza], I suggest that you trot over to your dictionary and look up the meaning of the word "monopolize". I suspect that you do not have the slightest notion of what it means. Then go down to the math department and have them show you how to figure out a ratio. . . . [O]nly an irrational person would assert that I hold a monopoly on the situation. So you see Jack, you really have me confused. You are either possessed by moments of irrationality or perhaps harbor some unstated reason for presenting so distorted a view of reality. Please provide further clarification and guidance on this matter so I can understand what you are struggling to say. . . .
>
> Now, Jack, stop and think for a moment. Do you really want to accuse *me* of acting "irrationally" with regard to the seating arrangements for the meeting? Once again I suggest that you trot back over to the dictionary and look up the meaning of the word, "irrational." I encourage you to do this because of the irrational and insulting "reason" you gave for why two rows of seats were so sloppily taped off. Your inept taping job almost made me trip and injure myself. I might have broken my neck and died! Please be more thoughtful in the future since I know that you would have a difficult time coming to school each day knowing I wasn't going to be there! . . .

In his second memorandum, Defendant's Exhibit 4, Hesse replies to Gaza's March 7 memorandum. Hesse again rejects as "irrational" Gaza's directive to behave professionally, and protests Gaza's refusal to tour the Art Department:

> Words cannot express the shock and disappointment I felt when you refused to leave your office and examine the evidence I wished to present. Such an

> act of irrationality and closed-mindedness is simply beyond my professional comprehension. This is especially disturbing when it is found in an individual charged with the responsibility to do a competent, fair, and impartial evaluation of a teacher!

Hesse goes on to say he has shown his evaluation to students:

> Your subjective and irrational prediction that any student who saw the evaluation would be engulfed with "negative feelings" and that the classroom would "further depreciate into a poor environment," is ludicrously wrong. Your evaluation of me has so far proven to be simply a source of much laughter and they wonder how you ever reached such conclusions, especially since you never even came into my room to evaluate me! Of course when they saw all the mistakes on Don's evaluation of me, they were speechless!
>
> I must say they thought it was so inaccurate that it was hilariously funny to them.

The panel unanimously found that both of these memoranda raised personal, not public, concerns. 848 F.2d at 751-2 and 755.

D. The Context of Hesse's Communications.

The four instances of speech here in issue must be understood in the context of professional criticism in which they occurred. Most importantly, a negative evaluation at the end of February, 1984 triggered Hesse's conduct at the Institute two days later, and his two subsequent memoranda about that event. All four communications were part of a long-running controversy between Hesse and the administration over criticisms of his work.

1. Hesse's February 28, 1984 Evaluation.

Although Hesse had previously clashed with the administration over his grading practices (*see* below, pp.

13-16), the evaluation that sparked Hesse's Institute-related behavior (Pl.Exs. 11, 12 & 13) said nothing about that issue. It cited Hesse's "apparent lack of warmth and concern for students" and his "attitude of aloofness, superiority, and planned detachment, resulting in a stifled atmosphere devoid of meaningful dialogue and expression" between Hesse and students. It recommended "creating an atmosphere that encourages positive verbal exchange between students and teacher." Pl.Ex. 13.

The evaluation further noted Hesse's failure to cooperate with evaluation procedures:

> *Uncooperativeness with administrative procedures* is evidenced by Mr. Hesse's poor effort and attitude toward completing the self evaluation document, cooperating with own department NCA [North Central Association] self study, and working with established disciplinary anecdotal procedures . . . . *Without a positive attitude toward constructive professional growth in the immediate future, Mr. Hesse will continue to be a liability* to his students, his department, his school, and his chosen profession.

Id. (Emphasis supplied).[4]

The evaluation additionally observed:

> Mr. Hesse's strong differences with the American educational system, the administration policies of both district and Schaumburg High School prevent him from reaching that potential. As a result of these differences in philosophy, Mr. Hesse's students and the Art Department are placed in the middle. The resulting strained environment impacts upon his students, the Art program, and ultimately the school.

Id.

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[4] In addition to the instances of noncooperation addressed in the evaluation, Hesse sometimes violated School District procedure by refusing to sign his evaluations. Tr., pp. 147-48, 154-55 (Hesse).

Hesse responded to his evaluation in an undated internal memorandum that parodied his evaluation in a purported review of his reviewers. Tr., pp. 134, 148 (Hesse); Pl.Ex. 17. Hesse mimicked language from his own evaluation, for example:

> According to my formal evaluation of you from my position as both a teacher and a taxpayer, I think that somewhere inside you there may be the skills to perhaps, possibly, maybe, with luck, enable you to become effective administrators . . . .
>
> Without a positive attitude toward constructive professional growth in the immediate future, Mr. Gaza and Mr. Maddox will continue to be liabilities to their teachers, their school, and their chosen profession.

Pl.Ex. 17. Like the evaluation, Hesse's memorandum suggested improvements for Gaza and assistant principal Maddox, asserting invalidity of the teacher evaluation process,[5] the meaninglessness of student opinion, and the administration's incompetence to evaluate him.[6] *Id.*

Hesse concluded by raising the issue of grade inflation, and stating:

> P.S. . . . I also have sent along a copy of Hans Christian Anderson's story "The Emperor's New Clothes". I hope that all of you, including Mr. Kolze

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[5] At trial Hesse similarly stated that to evaluate properly, the evaluator had to be with the teacher five days a week for nearly every day of the year. Tr., p. 164 (Hesse).

[6] Hesse admitted at trial that he has never accepted any criticism from Maddox. Tr., pp. 120-21 (Hesse), Pl.Exs. 21, p. 2, and 35, p. 2. Hesse told Maddox that he was not competent to evaluate him. Tr., pp. 449-50 (Maddox). Hesse also testified, "I object to being evaluated by people who don't understand anything about my field, and Mr. Whoever-was-in-that-day, they don't have a background in Art." Tr., p. 185 (Hesse).

and the school board, take the time to read it, comprehend it, and apply the wisdom it contains to your lives.

2. The On-Going Dialogue Between Hesse And The Administration.

The speech in issue was part of an eight-year series of challenges to criticisms of Hesse's performance. The first in this sequence of communications, a six-page reply to student criticisms of his teaching in 1977, sets a pattern typical of his subsequent writing. Beyond responding to the specific criticisms, he questions the motives of his critics and the validity of the criticism process. Pl.Gr.Ex. 9.

In 1979 Hesse sent six more memos to his reviewers. He wrote two on January 19, 1979. Pl.Gr.Ex. 9. One replied to a parental complaint that Hesse gave students inadequate direction, misled students that near-failing projects were "fine", and gave too many extremely low grades. Admitting that "fine" only means a work will not fail, that he failed 52% of the class and gave 92% less then a "C", *id.*, Hesse claimed "little intention or need to change my teaching techniques . . . " *Id.* He rejected remedial directives from his assistant principal, asserting his "refusal to be intimidated by the threat of a poor evaluation by any of my superiors". *Id.*

This memo also attacked the authority of his department chairman, Robert Wheat, and belittled Wheat personally and professionally. (*E.g.*, "Now, really, if I, a simple minded art teacher can detect such an obvious contradiction, how is that a Department Chairman did not become aware of it?" *Id.*)

Hesse's second January 19, 1979 memo, Pl.Gr.Ex. 9, attacked assistant principal Dennis Garber's decision to

handle in writing a student's claim that Hesse had advised her to circumvent School District procedures:

> Wellllllll, really, when I here [sic] one of those kids say, "Weimer doesn't know his ass from a hole in the ground."; I, if I were a School Board member, would want to have, shall we say, a little less emotional and impartial judgment of Mr. Weimer's administrative ability . . . . Perhaps, just perhaps, there is a valid point somewhere in the person's observations, but lets [sic] get the "big picture" before we all start to go off the deep end with the memo thing.

Id.

In the fourth memo, dated March 13, 1979, Pl.Gr.Ex. 9, Hesse replied to an adverse evaluation by Weimer and Wheat, Def.Ex. 1, recommending no salary increase because of such deficiencies as rigid grading policies and neglect of his students, one of whom Wheat observed lying on the floor asleep. Hesse's memo attacked Wheat as too hostile and incompetent to review Hesse objectively. Pl.Gr.Ex. 9. Hesse opined that he should be evaluating the evaluators. *Id.*

In reply to a criticism by Wheat that Hesse had deliberately disregarded directives concerning disciplinary measures, Hesse's fifth memo, dated June 4, 1979, lengthily criticized Wheat's professional performance, and questioned why Wheat did not report himself for procedural infractions. Pl.Gr.Ex. 9. Hesse added:

> P.S. Since I recognize the fact that Mr. Wheat is One Of The Boys From When The District Was Young, and therefore has connections upstairs, I cannot help but wonder if anything will be done about his conduct, especially since he never seems to take the time to write up an evaluation on himself, and the district does not seem to supply the teachers with a form to evaluate the performance of Those Above Them.

Id.

Hesse's next memo (Pl.Gr.Ex. 9) responded to Wheat's evaluation of June 7, 1979 (Pl.Gr.Ex. 3), which cited, *inter alia*, Hesse's low opinion of his students, negative teaching methodologies, rigid grading procedures, and student dissatisfaction with his disciplinary procedures. *Id.* The memo asked "how in hell is it that the administration, with their wonderful 'teacher evaluation' procedures, cannot detect the presence of [incompetent] teachers in their staff?????" The memo was filled with such remarks as:

> I must admit that the thought has crossed my mind that not even Jesus Christ could get a good evaluation in a classroom once those doing the evaluation decided to abuse the evaluation instrument by distorting and deleting relevant information. . . .
>
> In fact, since *I* have nothing to hide about my conduct as a teacher in *my* classroom I have a special deal to offer you. If Mr. Wheat is willing to have a T.V. and a sound recording system in all of his classes next year, I too will be more than willing to have such a system in all of my classes. In that way we can all clear up all these rather subjective observations about my teaching ability. After all, by comparing me to a "master teacher" of many years of experience, surely my slightest flaws will show up in a most glaring manner when compared with his efforts. Great Idea, right????
>
> * * *
>
> Soooooooooooooo, let me just say that as *I* see the situation, this has been a *really fine year* of teaching, as far as I am concerned. (Undoubtedly such a statement on my part will inspire action to deprive me of yet more "mythical money" when I achieve my other M.A.s, my PhD [sic], and any salary I may earn as President of China.)

Pl.Gr.Ex. 9 (emphasis original).

Hesse's unauthorized grading practices ultimately caused a student to fail who would have passed under

district-wide grading policy. Tr., pp. 456-57 (Kolze). Kolze and Weimer met with Hesse on August 10, 1979 and directed him to follow all School District policies. Tr., p. 458 (Kolze). Kolze reiterated the warning in a letter of August 30, 1979 and advised him that "[d]isregard of Board of Education policies and procedures will constitute insubordination". Def.Ex. 11. Hesse temporarily conformed to District procedures.

E. The Notice to Remedy.

Based on findings of grossly insubordinate and uncooperative conduct, as well as disruptive and uncivil use of ridicule and defamatory remarks, the School Board sent Hesse a notice to remedy on June 1, 1984, in accordance with a statutory requirement that school boards give teachers the opportunity to cure remediable performance deficiencies. Ill.Rev.Stat. ch. 122, sec. 24-12 (1987). The School Board directed Hesse to remedy his conduct by, *inter alia*, the following:

> Cease writing letters to the administration critiquing or evaluating them as administrators. They, not you, are responsible for evaluation. . . .
>
> You are directed not to convert constructive criticism of your teaching into a challenge to the authority of the administration making that criticism. . . .
>
> You are directed to cease immediately all such insubordinate and sarcastic commentary.

Id. The School Board listed professional and pedagogical objectives for Hesse to follow, and warned that failure to take remedial action would be cause for dismissal. The notice specifically cited Hesse's two memoranda to the administration concerning his conduct at the Institute. *Id.*

On the same date, the School Board directed Hesse to submit to a psychiatric examination pursuant to its statutory authority to require medical examination of employees. Ill.Rev.Stat. ch. 122, ¶24-5 (1987), Pl.Ex. 25. When Hesse's attorney objected, the School Board withdrew the request. Pl.Ex. 27. The School Board was concerned with Hesse's episodes of bizarre and inappropriate behavior. Tr., p. 271 (Gaza). At trial Hesse admitted he suffered mental disequilibrium during the relevant time period, and that removal from classroom to study hall assignments helped him overcome depression. Tr., p. 173 (Hesse).

F. Later Communications.

Hesse continued his protests during the 1984-85 school year, addressing the School Board on numerous occasions, including a meeting on October 13, 1984. Tr., p. 98 (Hesse). The School Board, which had issued the notice to remedy at the end of the prior school year, had final supervisory authority over him as his employer. Some of Hesse's topics included low grading standards, competency testing for students and teachers, student discipline, and teacher evaluation procedures. Tr., pp. 98-100 (Hesse). The record is extremely vague as to the specific subject matter of his speech during any of these appearances at the School Board. *Id.*

Within five days in Mid-December, Hesse wrote four separate memoranda to the School Board. In the first, a memorandum to the School Board dated December 8, 1984, Pl.Ex. 38, Hesse questioned the method by which students' semester grades were averaged. He stated "the current policy is simply very effective at passing students who would otherwise fail," and suggested that the extant

policy "encourages district wide grade fraud." *Id.* The memorandum did not address Hesse's current evaluations, but dealt with the grading policy he had previously violated, leading to the August, 1979 warning letter. Def.Ex. 11, and Tr., pp. 36-37 (Hesse).

Three days later, in a memorandum dated December 11, 1984, Pl.Ex. 39, Hesse wrote the School Board concerning his remediation notice in the following language:

> The truth of the matter is that far from being someone who rejects constructive criticism I am someone who eagerly awaits the arrival of such information, especially when it is based on actual facts. I am also waiting for the Cubs to win the World Series. . . .
>
> I suggest that you consider your duties as a public servant and take the following actions:
>
> 1. Do try to cheer up a wee bit and make an effort to develop a sense of humor about this entire situation . . .
>
> 11. . . . After all, it [the taped rows at the Institute] looked more like a photo I once saw showing the web of a spider on LSD, rather than a professional demarcation of a reserved seating area.
>
> 12. . . . That Mr. Gaza has yet to have even the smallest item named after him is also a matter of fact. While he is still in his "rookie" years I have no doubt that as his judgments improve, the board will name something far larger than an ashtray after him as well.
>
> 13. Jog on over to a globe and notice that we are living in the United States of America.

Hesse wrote two more memoranda the following two days, December 12 and 13, 1984. Pl.Ex. 40 & 41. Hesse complained to the School Board that his teaching load and the requirement that he submit daily lesson plans were unconstitutional harassment. He accused the School Board of trying to make his job as unpleasant as possible, and of paranoia. *Id.*

The full panel agreed that the memoranda of December 11, 12, and 13 did not touch on matters of public concern. 848 F.2d at 751-52 and 755. The dissent contended that the December 8, 1984 memorandum, as well as Hesse's October 13 appearance before the School Board, were constitutionally protected, and would have remanded for further proceedings under *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). *Hesse*, 848 F.2d at 754 *et seq.*

The majority proceeded on the *arguendo* assumption that the December 8 memorandum dealt with a matter of public concern. *Id.* at 752. However, viewing the memorandum "from the vantage point of its cumulative disruptive effect on the Board's ability to maintain harmony and discipline in the workplace", *id.* at 753, n.4, it concluded that it was constitutionally unprotected. *Id.* The majority similarly determined that the October 13 speech was no "more than part of a long-running defense of his teaching practices." *Id.* at 751 n.2.

As Hesse advised the Seventh Circuit in his Petition for Rehearing (at 3), his communications during the 1984-85 academic year are not the basis of his claim.

G. Hesse's Subsequent Employment in the District

Hesse had twice requested a transfer from Schaumburg. Tr., pp. 95-96 (Hesse). Union representative Gerz suggested Hesse's transfer. Tr., pp. 207-08 (Gerz); p. 273 (Gaza).

For the 1985-86 school year, it became necessary to transfer an art teacher qualified to teach photography from Schaumburg to a traveling position between two other district high schools. Only two teachers were qualified, and neither responded to the administration's

request for a volunteer. Hesse was chosen because the other had previously been transferred involuntarily. Tr., pp. 276-77 (Gaza); pp. 176-77 (Hesse); pp. 351-53 (Chapman).

When Kolze informed Hesse of the reasons for his selection in a meeting about the transfer, Hesse acknowledged that this would be an opportunity to try out the other two schools. Tr., pp. 459, 463 (Kolze); Def.Ex. 12.

A full-time position opened at one of those schools for the 1986-87 school year. Hesse applied and got the job. Tr., p. 354 (Chapman). Hesse works there to this day, and is not seeking employment outside the School District. By changing jobs, he would lose his tenured status. Tr., pp. 171-72 (Hesse). He has lost no pay. Tr., p. 174.

H. The School Officials' Responsibilities.

In their respective capacities as overseers and administrators of the School District, appellants were responsible for supervising the School District's 700-member faculty, including Hesse. Appellants are statutorily charged with promulgating educational policy, and with enforcing the School District's educational policies throughout the system.[7] Ill.Rev.Stat. ch. 122, ¶10-20.5 (1987).

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[7] The School District's educational policies are set forth in the School District's Policy and Procedure Handbook (Pl.Ex. 10). All teachers receive a copy of the handbook. School Board policy requires teachers to follow certain grading procedures, admonishing:

> The subject of grading is extensive and complex; yet it is imperative that all teachers maintain uniformity in grading and evaluating students. IT IS FOR THIS REASON THAT THE FOLLOWING PROCEDURES MUST BE CAREFULLY FOLLOWED.

(Continued on following page)

I. Charge to The Jury On Protected Speech.

Over defendants' objection, the trial court gave the following instruction on the First Amendment:

> I instruct you, ladies and gentlemen, that plaintiff's statements on the subjects of grading, and student discipline policies, and teacher evaluation procedures constitute speech on matters of public concern and are, therefore, entitled to Constitutional protection.

Tr., p. 622.

Hesse asked the jury for damages of $1.00. Tr., p. 595. The jury returned a verdict of $125,000. R. 20.

(Continued from previous page)

(Emphasis original.) School District policy further requires teachers to maintain professional working relationships with other teachers, administrators, and support staff, and to be cooperative. Tr., pp. 328-29; *Id.* The evaluation process and criteria, which were prepared jointly by the School Board and the teachers' union, are set forth at *id.* Tr., pp. 329-30 (Chapman).

In teacher evaluation, cooperativeness is an essential attribute. The handbook defines "cooperativeness" as follows:

> A cooperative teacher is one who can work with colleagues to accomplish certain goals, one who is willing to compromise when necessary to attain agreed upon goals, one who uses positive methods and appropriate channels to initiate change. Cooperativeness is not synonymous to being a "yes" man. For a cooperative teacher can be a critical thinker and an initiator of change. The means he uses to obtain his goals are the key to cooperativeness, rather than the specific goals in which he believes.

Id. Tr., pp. 333-34 (Chapman).

REASONS FOR DENYING THE PETITION

I. THE DECISION OF THE SEVENTH CIRCUIT PROPERLY APPLIES THE *CONNICK* TEST.

A. Hesse Misconceives The *Connick* Test.

Hesse seeks review under a reductive interpretation of *Connick* that would nullify its fact-sensitive response to the whole of a case. Limited to gross content, Hesse's test would elevate *all* speech on education to the level of public concern.[8]

Over twenty years ago this Court cautioned against any such narrow view of First Amendment questions:

> Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be . . . we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.

Pickering v. Board of Education of Township High School District 205, 391 U.S. 563, 569 (1968).

In *Connick* this Court rejected a content-based test for a flexible three-part analysis:

> Whether an employee's speech addresses a matter of public concern must be determined by the *content, form, and context* of a given statement, *as revealed by the whole record.*

Id. at 147-48 (emphasis supplied.) The complexities of language and communication require scrutiny of form

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[8] *Bowman v. Pulaski County Special School District*, 723 F. 2d 640 (8th Cir. 1983), which Hesse here cites, was decided under the *Pickering* balance. It did not review whether the speech (on physical abuse of students) was a matter of public concern.

and context. Thus *Connick* directs scrutiny of the *circumstances* of a communication, 461 U.S. 149, n. 8, and of the role of the speaker:

> We hold only that when a public employee speaks not *as a citizen* upon matters of public concern, but instead *as an employee* upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision. . . .

Id. at 147 (emphasis supplied).

Applying these principles, the *Connick* Court stressed that the *focus* of the plaintiff Sheila Myers's speech was "to gather ammunition for another round of controversy with her superiors", in "an attempt to turn that displeasure into a *cause celebre*." 461 U.S. at 148. So it is here.

B. The Seventh Circuit Properly Considered The Content, Form and Context of Hesse's Speech.

1. There Is No Reason to Reconsider The Personal Content of Hesse's Speech.

Remarkably, while ignoring the contemptuous, insubordinate statements that fill his speech, Hesse argues for a content-based approach to First Amendment analysis. An expression of hostility, or a complaint about one's job, may be the content of speech. An insult, an attack, a gibe, or a slur may also constitute content. Hesse would remove them from consideration.

There is no basis for Hesse's claim that in the panel decision, "the tone and the intent of the speaker were given considerable weight over the subject and content of the speech." Pet., p. 7. On the contrary, the panel closely scrutinized the individual content of each of Hesse's writings and speeches, concluding that they "were directed to the defense of his personal teaching methods

and his resentment of the evaluations and criticisms of those methods".[9] 848 F.2d at 751 *et seq.* This highly personal content dictated the holding that the communications were outside the pale of public concern.

Hesse's so-called "objective" test, which attaches "public concern" to *all* speech about education, in fact renders meaningless the *Connick* criterion of content.

> To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark - and certainly every criticism directed at a public official - would plant the seed of a constitutional case.

Connick, 461 U.S. at 149.

2. There Is No Reason To Reconsider The Personal Form and Private Context of Hesse's Speech.

Raw words do not constitute "speech." Their meaning derives from their form and their context, as well as their dictionary definition. The Seventh Circuit properly considered the insubordinate, intensely personal tone of Hesse's language.[10] Hesse's pervasive ridicule and

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[9] The court noted a sole exception, the December 8, 1984 memorandum, which was "arguably directed to a matter of public concern," and thus subject to the *Pickering* balance. 848 F.2d at 752.

[10] Hesse notes (at 6) that the majority considered the sarcastic, offensive form of Hesse's speech. The majority in fact cautioned:

> We are not implying that sarcastic speech is not entitled to constitutional protection. We only note the sarcastic form of Hesse's speech as a *measure of its disruption to the workplace,* as well as its *highly personal tenor.*

848 F.2d at 752, n.3 (emphasis supplied). *Eiland v. City of Montgomery,* 797 F.2d 953 (11th Cir. 1986), which concerned a brief satiric poem, in rhymed couplets, on an election issue, is inapposite.

contempt were not just the medium, but an intrinsic part of the message.

Hesse incorrectly characterizes the panel opinion as "look[ing] *primarily* to Hesse's *disagreement* with the school district . . . and interpret[ing] his *intent* as removing the issue from the realm of public concern". (Pet., p. 6, emphasis partially supplied.) On the contrary, the Court of Appeals looked primarily to the *content* of Hesse's speech, determining that any discussions of educational policy were tangential to his personal employment interests, and that his communications "were not intrinsically on a matter of public concern." 848 F.2d at 752.

C. The Decision Of The Seventh Circuit Accords With The Opinions Of Other Circuit Courts.

Hesse cites no case, and the School Board knows of none, in which repeated verbal abuse like Hesse's was held to be protected. On the contrary, "It is firmly established that the First Amendment's shield does not extend to speech and conduct amounting to insubordination directed at school officials." *Kelleher v. Flawn*, 761 F.2d 1079, 1084 (5th Cir. 1985) (collecting cases). The *Kelleher* court thus upheld a teacher's demotion due to belligerence and insubordination to her department chair.

This conclusion is reinforced by the Eleventh Circuit's recent decision in *Kurtz v. Vickrey*, 855 F.2d 723 (11th Cir. 1988), which considered a professor's communications, both public and private, on a wide range of university issues. The court found inactionable his expressions of contempt for the university president: "Obviously, much of the men's dispute, and Kurtz's speech, derived from their apparent personality conflicts,

a matter not of public concern." *Id.* at 729. Finding, in contrast, that "[t]he content of his criticism of the university's spending priorities related to a matter of public concern", *id.* at 730, the court carefully limited its holding to the professor's complaints "beyond the scope of internal management." *Id.* Moreover, unlike this case, no factual or thematic nexus bound the professor's personal grievances to the rest of his speech.

No circuit holds, as Hesse argues (at 7), that an employee's involvement in a dispute with a public employer abolishes First Amendment protections. All agree that the same instances of speech may share public and private aspects. *Vukadinovich v. Bartels*, 853 F.2d 1387, 1390 (7th Cir. 1988). All of the cases Hesse cites concern major public issues, inapplicable here. *Cf. Zamboni v. Stamler*, 847 F.2d 73 (3d Cir. 1988) (charge that a promotional program evaded statutory civil service requirements a matter of public concern); *Hall v. Ford*, 856 F.2d 255 (D.C. Cir. 1988) (charges of financial improprieties, drug use and eligibility cheating in an athletic program a matter of public concern); *Rode v. Dellarciprete*, 845 F.2d 1195 (3d Cir. 1988) (public interview alleging victimization by racial discrimination).[11]

Context or form may be meaning-determinative for one communication, irrelevant to another. These cases

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[11] Hesse cites *Joyner v. Lancaster*, 815 F.2d 20 (4th Cir.), *cert. denied*, 108 S.Ct. 102 (1987), as holding that electioneering did not constitute a matter of public concern due to the employee's motive of personal gain. Pet., p. 7. In fact, the Fourth Circuit decided the case under the *Pickering* balance, citing evidence of deep disruption to the police department from the employee's self-interested conduct.

show the *Connick* test's responsiveness to the full range of employee speech.

II. THE DECISION OF THE SEVENTH CIRCUIT PROPERLY EMPLOYS THE PICKERING BALANCE.

Hesse charges that the Seventh Circuit "employed a subjective balancing test, *creating* imagined harm to outweigh free speech". Pet., p. 9 (emphasis supplied). This accusation arises from Hesse's own misunderstanding of the nature of disruption.

A. The Panel Did Not "Engage Its Imagination To Weight The Balance In Favor Of The Employer."

Hesse's assertion that there is no factual evidence of disruption is belied by the massive documentary and testimonial evidence of Hesse's persistent insubordination and defiance of legitimate authority, as it applied to his own teaching responsibilities. Hesse's verbal assaults on his superiors undermined vital working relationships and obstructed the functioning of important School District procedures.

Providing quality education demands effective supervisory relationships between teachers and their designated overseers. As the Fourth Circuit stated in *Chitwood v. Feaster*, 468 F.2d 359, 361 (4th Cir. 1972), an educational institution

> has a right to expect a teacher to follow instructions and to work cooperatively and harmoniously with the head of the department. If one cannot or does not, if one undertakes to seize the authority and prerogatives of the department head, he does not immunize himself against loss of his position simply

because his noncooperation and aggressive conduct are verbalized.

Thus, to sustain their high responsibilities, educators must maintain loyal, cooperative relationships with their superiors no less than firefighters, *see Germann v. City of Kansas City*, 776 F.2d 761 at 763, 765 (8th Cir. 1985), *cert. denied*, 107 S.Ct. 63 (1986) (department head "relied on management employees to implement his policies on a day-to-day basis in the field"; close supervision impossible, thus personal loyalty "critical to the management structure"); attorneys, *see Connick*; and appraisers, *see McAdams v. Matagorda County Appraisal District*, 798 F.2d 842, 847 (5th Cir. 1986) (employee's challenge to board damaged important working relationships, despite employee's job independence, where employee responsible for executing board directives).

B. The Decision Accords With The Opinions Of Other Circuit Courts.

None of the cases Hesse cites (Pet., pp. 9-10) concerns the direct, flagrant insubordination that this case presents. Bald defiance of one's supervisors, in their supervisory capacity, is not "mere potential for disruption," but an "objectively justifiable basis" for discerning harm to the employer's interests. *Connick, supra*, at 163 n. 3. (Brennan, J., dissenting); *cf.* Pet., p. 10.

III. THIS FACTUALLY UNIQUE CASE ILLUSTRATES NO PERVASIVE PROBLEMS IN SCRUTINY OF SPEECH BY PUBLIC EMPLOYEES.

With its eight-year private protest on the single issue of performance criticism, this case is inapt for reviewing any inconsistencies in the analysis of First Amendment issues by the federal courts. It requires an analysis that

would not illuminate the ordinary First Amendment case.[12]

This appeal, moreover, presents no significant controversy. The four episodes of speech that Hesse contests are well beyond the scope of Constitutional protection, as the panel unanimously determines.[13] They illustrate no issue requiring this Court's further guidance.

Although beyond the scope of the Petition, the issues framed by the dissent are likewise of no consequence. The December 8, 1984 memorandum was written back to back, in the space of a few days, with three memoranda on similar themes but addressing Hesse's work problems directly. In keeping with *Pickering*, the majority properly relied on the powerful nexus between this writing and Hesse's explicitly personal and abusive statements.

The record is too vague, as the majority correctly concluded (and as the dissent strongly suggests, 848 F.2d at 756, n. 6), to support the dissent's view that Hesse's comments during his various appearances before the School Board were anything more than part of his "long-running defense of his teaching methods." *Id.* at 751, n. 2.

The Petition should be denied.

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[12] It would not, for example, illuminate any conflicts among the factually distinct cases listed at pp. 7-8 of the Petition.

[13] The majority and the dissent differ slightly as to the analysis of Hesse's speech at the Institute. The dissent applies the *Pickering* balance. 848 F.2d at 757. The majority more appropriately determines that under *Connick*, Hesse's anxieties about his recent evaluation not only motivated, but dominated, his few minutes of speech. *Id.* at 751, n. 2. Consistent with *Pickering*, the majority considers the evidence of disruption as well. *Id.* at 753. There is no reason to review the unanimous result of these parallel analyses.

CONCLUSION

The Court of Appeals correctly applied the principles established by this Court, in a decision that does not conflict with the decision of any other court of appeals. The Petition has failed to show any reasons why this Court should review any aspect of the decision. The Petition for Certiorari should be denied.

January 6, 1989.

Respectfully submitted,

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